

MISSOURI COURT OF APPEALS WESTERN DISTRICT

STATE OF MISSOURI,)
) WD74249
Respondent,)
v.) OPINION FILED:
)
TYOKA L. LOVELADY,) February 19, 2013
)
Appellant.)

Appeal from the Circuit Court of Jackson County, Missouri Honorable Wesley Brent Powell, Judge

Before: Thomas H. Newton, P.J., Joseph M. Ellis, and Gary D. Witt, JJ.

Mr. Tyoka L. Lovelady appeals the trial court's judgment finding him guilty after a bench trial of one count of drug possession. Mr. Lovelady argues that the trial court erred in overruling his motion to suppress evidence and his objections to admission of that evidence. We reverse and remand.

Factual and Procedural Background¹

On the Saturday night of Memorial Day weekend, May 30, 2009, around 10:35 p.m., Officer Chris Smith and his partner Officer Chad Fenwick of the Kansas City Police Department were on patrol. The officers saw Mr. Lovelady riding his bicycle in circles in

¹ The following facts are taken from the arresting officers' testimony, and we resolve conflicts or ambiguities in their testimony with evidence shown and heard in videos from the dashboard cameras of three different police vehicles present at the scene of arrest. We provide the facts in the light most favorable to the ruling. See *State v. Waldrup*, 331 S.W.3d 668, 672 (Mo. banc 2011).

the intersection of 11th and Agnes. As they were driving by, Mr. Lovelady waved at the officers and Officer Smith heard him say, "They went that way," while pointing down the street. As he pointed, Officer Smith saw what appeared to be a gun sticking out of Mr. Lovelady's waistband. Officer Smith told Officer Fenwick to back up because Mr. Lovelady had a gun; Officer Fenwick stopped the car, reversed it, and stopped again. The officers quickly exited the vehicle and pointed their guns at Mr. Lovelady. They ordered Mr. Lovelady to get on the ground. Mr. Lovelady cooperated as Officer Smith approached him, removed the gun, and placed him in handcuffs for theirs and Mr. Lovelady's safety. Once in handcuffs, Mr. Lovelady was taken to the front of the patrol car and asked if he had seen anything the officers should know about; the officers did not obtain any information. The officers examined Mr. Lovelady's gun and determined it to be an Airsoft gun, which they considered a toy although it resembled a real gun.

Immediately thereafter, one of the officers asked police dispatch if Mr. Lovelady had any warrants for his arrest. The dispatcher reported that a pickup order existed for Mr. Lovelady's arrest. Mr. Lovelady was placed under arrest and then searched for weapons or illegal substances. Officer Smith found a kitchen knife and a white substance in Mr. Lovelady's pants pocket. Later at the scene, the officers had the white substance field tested; the results indicated that the substance contained cocaine. The State charged Mr. Lovelady with one count of possession of a controlled substance, section 195.202.

Mr. Lovelady filed a pretrial motion to suppress the illegal substance found on his person. The trial court held a hearing on the motion, and both officers testified about the incident. Additionally, Officer Smith testified that they believed Mr. Lovelady was under

that it was uncommon to see someone riding a bicycle late at night in that area, which he considered a high crime area. He further stated that it was routine to run warrant checks. Mr. Lovelady adduced three separate dashboard camera videos of the arrest and search incident to the arrest: one from the arresting officers' patrol car, one from a responding officer's patrol car, and one from the van that transported Mr. Lovelady and his bicycle to the precinct.

During closing arguments at the suppression hearing, the State argued that even after the officers discovered the gun was a toy, they had reasonable suspicion to investigate Mr. Lovelady's identity based on Mr. Lovelady's presence at night on a bicycle in the neighborhood and because he waved down the officers. Mr. Lovelady argued that his detention was unlawful because they did not have reasonable suspicion of criminal activity. He stated that the gun in his waistband area was the reason the police seized him, and displaying a gun in such a manner was not criminal. Alternatively, Mr. Lovelady argued that once the officers knew the weapon was a toy, further detention of Mr. Lovelady became unlawful.

On July 7, 2011, the trial court overruled the motion to suppress. The trial court noted inconsistencies between the officers' testimony and the videos from the dash cameras. However, it found the officers' testimony to be credible. Notably, it determined that the nature of the gun was discovered before the officers searched for warrants. Mr. Lovelady filed a motion to reconsider the motion to suppress. On August 10, 2011, the trial court issued a second order denying the motion to suppress. On August 19, 2011, a

bench trial was held, in which the parties stipulated to the evidence presented in the suppression hearing, subject to Mr. Lovelady's objections. The parties additionally stipulated that the State's witness would testify that the substance found on Mr. Lovelady was cocaine base. Mr. Lovelady moved to acquit at the appropriate times, and the trial court denied the motions. The trial court found Mr. Lovelady guilty of possession of cocaine base. The trial court sentenced Mr. Lovelady to two years imprisonment, suspended execution of the sentence, and placed Mr. Lovelady on probation for two years.

Standard of Review

We will reverse the trial court's ruling on a motion to suppress if that ruling is clearly erroneous. *State v. Taber*, 73 S.W.3d 699, 703 (Mo. App. W.D. 2002). We examine the evidence admitted at the hearing and at the trial, viewing the evidence and inferences drawn therefrom in the most favorable light to the trial court's ruling. *State v. Long*, 303 S.W.3d 198, 201 (Mo. App. W.D. 2010). We will not reverse even if we would have weighed the evidence differently if the ruling is supported by substantial evidence. *State v. Haldiman*, 106 S.W.3d 529, 533 (Mo. App. W.D. 2003); *Taber*, 73 S.W.3d at 703. The question of whether the conduct in issue violates the Fourth Amendment is an issue of law that the appellate court reviews *de novo* based on the trial court's findings of facts. *State v. Norfolk*, 366 S.W.3d 528, 534 (Mo. banc 2012).

Legal Analysis

In the sole point on appeal, Mr. Lovelady argues that the trial court erred in denying the motion to suppress the evidence because the arresting officers lacked

reasonable suspicion to stop him and alternatively, lacked reasonable suspicion to detain him further after determining that his gun was not real but was instead a toy.

A person has a right to be free from unreasonable searches and seizures under the Fourth Amendment to the Constitution. *Id.* at 533. A person is seized when a reasonable person would have believed that he was not free to leave the officer's presence in the totality of the circumstances. Id. Such seizure is reasonable when the stop is brief and based on the officer's reasonable suspicion that illegal activity has occurred or is occurring. Id. A suspicion is reasonable when, in light of the totality of the circumstances, the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." State v. Grayson, 336 S.W.3d 138, 143 (Mo. banc 2011) (internal quotation marks and citation omitted). "Although reasonable suspicion means more than an inchoate and unparticularized suspicion or 'hunch,' it is considerably less than a preponderance of the evidence, and obviously less demanding than even a fair probability or probable cause." State v. Daniels, 221 S.W.3d 438, 442 (Mo. App. S.D. 2007) (internal quotation marks and citation omitted). In evaluating reasonable suspicion, we determine: "(1) whether the circumstances support a finding of reasonable suspicion justifying the initial stop and (2) whether the officer's actions were reasonably related in scope to the circumstances which justified the interference in the first place." State v. Waldrup, 331 S.W.3d 668, 673 (Mo. banc 2011) (internal quotation marks and citation omitted). Continuing to detain a person beyond the time reasonably necessary to effect the initial purpose of the detention is unlawful, absent a showing that a new factual predicate for reasonable suspicion developed based on the person's behavior during the period of lawful seizure. *See State v. Martin*, 79 S.W.3d 912, 916 (Mo. App. E.D. 2002); *see also State v. Stover*, No. SC 91760, 2012 WL 4364173, *8 (Mo. banc September 25, 2012).

Mr. Lovelady argues that the officers did not have reasonable suspicion that he was involved in criminal activity to initially stop him because carrying a weapon visible to the public's eye is legal activity. Police may use all information available to them in forming their basis for reasonable suspicion and related actions. *Norfolk*, 366 S.W.3d at 534. Such information includes an officer's "own experiences and specialized training" on which he or she may rely in drawing inferences that "might well elude an untrained person." *Id.* Thus, "[i]nnocent behavior," or "particular types of noncriminal acts" may provide a basis for reasonable suspicion if the officer believes that a degree of suspicion is attached to the conduct. *Daniels*, 221 S.W.3d at 442 (internal quotation marks and citation omitted).

Riding a bicycle at night in the street of a residential neighborhood and gaining the attention of police officers is innocent activity. As the trial court found, the officers "stopped [Mr. Lovelady] and detained him while they determined the nature of the weapon." It was the presence of a pistol on his person that alerted the officers, causing them to promptly exit their patrol car with their guns drawn. The presence of the gun also caused them to order Mr. Lovelady to the ground and to handcuff him.

Mr. Lovelady is correct that carrying a lethal weapon in public is generally not a crime unless certain circumstances exist such as the weapon is concealed on the person,

the person is a felon, or the person is underage. See §§ 571.030, 571.070.2 A weapon may be concealed when it can only be observed from one viewpoint. State v. Purlee, 839 S.W.2d 584, 590 (Mo. banc 1992) (internal quotation marks and citation omitted) ("A weapon is not concealed simply because it is not discernible from a single vantage point if it is clearly discernible from other positions. It may be concealed, however, where it is discernible only from one particular vantage point.").

The mere presence of the gun was not criminal activity.³ However, as the officers testified, guns are dangerous and threatening. Mr. Lovelady's carrying of a gun may have been legal activity, but when considered together with the other innocent activity presence in a crime prone area at night on a bicycle doing circles—Mr. Lovelady's behavior carried a degree of suspicion justifying a stop to determine his identity and his purpose for carrying a lethal weapon.⁴

We now turn to the issue of whether that reasonable suspicion justified the continued detention of Mr. Lovelady after the officers determined the gun was not a lethal weapon. Officers are allowed to perform a brief investigatory stop of persons engaged in ambiguous conduct that could be considered criminal or innocent. Illinois v. Wardlow, 528 U.S. 119, 123 (2000). But "[i]f the officer[s] do[] not learn facts rising to the level of

² Statutory references are to RSMo 2000 and the Cumulative Supplement 2009.

³ The trial court was presented with the issue of whether the gun was concealed or visible and did not decide the matter. It found that it was reasonable for the officers to have investigated because Mr. Lovelady was in a residential neighborhood late at night with what appeared to be a gun.

⁴ We are cognizant that a person's presence alone in a high crime area is not by itself a determinative basis for reasonable suspicion; however, it is a significant factor to consider. State v. Long, 303 S.W.3d 198, 202 (Mo. App. W.D. 2010); State v. Peery, 303 S.W.3d 150, 156 (Mo. App. W.D. 2010); State v. Schmutz, 100 S.W.3d 876 (Mo. App. S.D. 2003). We are also cognizant that "the time of the day is only a marginal consideration in the reasonable suspicion analysis." Peery, 303 S.W.3d at 155 (internal quotation marks and citation omitted).

probable cause, the individual must be allowed to go on his way." *Id.* at 126. The State argues that further detention was still permissible under *Waldrup*, suggesting that the officers still had concerns about Mr. Lovelady after determining the gun was a toy. *See* 331 S.W.3d at 678.

In *Waldrup*, the supreme court determined that the continued detention of Mr. Waldrup was a reasonable seizure "because the police had a lawful basis for the initial stop and had continued concern about the presence of a weapon that justified prolonging the defendant's stop for the officers' safety." *Grayson*, 336 S.W.3d at 146 n.4. The troopers testified to specific articulable facts, stating that Mr. Waldrup's facial reaction and furtive movements in their experience suggested that criminality was afoot and required investigation. *Waldrup*, 331 S.W.3d at 673. One of the troopers further testified that his frisk of Mr. Waldrup and the scan of the vehicle had not dispelled his suspicions. *Id.* at 675. Because reasonable suspicion remained, the court determined that further detention was reasonably within the scope of the investigation. *Id.* at 675-76.

This case is distinguishable from *Waldrup*. Here, the officers' sole basis for seizing Mr. Lovelady was the presence of a gun on his person in a high crime area late at night. The officers had already determined that Mr. Lovelady's gun was a toy before examining his identification, and the officers did not testify to articulable facts supporting reasonable suspicion that were developed during the period of lawful detention.⁵ The evidence showed that Mr. Lovelady cooperated during the investigation. Moreover, in

⁵ Although Officer Smith testified that they believed Mr. Lovelady was under the influence of something, he did not identify what behavior of Mr. Lovelady's was unusual or why in his experience it supported reasonable suspicion. Officer Fenwick suggested that Mr. Lovelady's identification was searched for warrants out of their normal routine.

the video, one of the arresting officers tells an officer in a patrol car that had arrived at the scene that they were fine and that the man arrested had a fake gun, before asking dispatch to perform a warrant check.

Because the trial court found that the officers determined that the gun was a toy before they ran the computer search on him, this case is similar to *Taber*, 73 S.W.3d at 99. The police stopped Ms. Taber under the reasonable suspicion that she was violating Missouri licensing and registration laws because her vehicle and trailer did not have front tags. *Id.* at 701. Upon stopping her, the police noticed that the vehicles displayed Kansas license plates and knew Kansas law did not require front tags. *Id.* at 702. The police informed Ms. Taber of this and then asked to see her identification. *Id.* A license and record check of her identification revealed an arrest warrant. *Id.* Pursuant to a search incident to arrest, drugs were found. *Id.* The court found that the police had continued a lawful stop by asking Ms. Taber for her license. *Id.* at 706-07. It further found that because the continued detention of Ms. Taber was not consensual, it was unlawful because the police's basis for reasonable suspicion had been dispelled. *See id.* at 707.

Because Officers Smith and Fenwick's articulated basis for reasonable suspicion was dispelled prior to the warrant check and no new facts were developed, the continued detention of Mr. Lovelady was unlawful. The handcuffs should have been removed from Mr. Lovelady, thereby releasing him to go home as he had requested.⁶

Evidence that is directly discovered due to a Fourth Amendment violation should be excluded. *Grayson*, 336 S.W.3d at 146. In *Taber* and *Grayson*, it was determined that

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⁶ Mr. Lovelady lived on the block.

the evidence discovered during the search incident to arrest should have been suppressed

since the officer would not have discovered that the driver had an arrest warrant but for

the unlawful seizure. Id. at 149-51. Likewise, we find that because the seizure of the

cocaine base was the direct result of the request for Mr. Lovelady's identification, it

should have been suppressed. Thus, the trial court erred in overruling Mr. Lovelady's

motion to suppress the evidence. Mr. Lovelady's sole point is granted.

Conclusion

Therefore, we reverse the trial court's judgment and remand the case.

/s/ THOMAS H. NEWTON

Thomas H. Newton, Presiding Judge

Ellis and Witt, JJ. concur.

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